

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(San Joaquin)

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CLEO DIANE JOHNSON et al.,

Plaintiffs and Respondents,

v.

SOUTH SAN JOAQUIN IRRIGATION DISTRICT,

Defendant and Appellant.

C079200

(Super. Ct. No. 39-2011-  
00268620-CU-PO-STK)

ORDER MODIFYING  
OPINION AND DENYING  
REHEARING

[CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed in this case on December 12, 2018, be modified as follows:

On page 18, third sentence of the Disposition, remove “Each party shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)” and replace with the following:

“Plaintiffs are awarded their costs on appeal. (Code Civ. Proc., § 1036; Cal. Rules of Court, rule 8.278(a)(3).)”

This modification changes the judgment. (Cal. Rules of Court, rule 8.264(c)(2).)

The petition for rehearing is denied.

FOR THE COURT:

      /S/        
BLEASE, Acting P. J.

      /S/        
BUTZ, J.

      /S/        
MAURO, J.

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In December 2010, the South San Joaquin Irrigation District (the District) closed a gate in a storm water drainage system it owned so it could make repairs. The closed gate caused storm water to flood and damage Cleo Johnson's real property, as well as her personal property and the personal property of her son, Richard Johnson, and that of Richard's fiancé, Jessica Marquez. We will collectively refer to the plaintiffs as Johnson unless it is necessary to be more specific.

Johnson sued the District and the County of San Joaquin, alleging inverse condemnation and tort causes of action. The County settled, the trial court found the District liable for inverse condemnation, and a jury found the District liable on the tort causes of action. The trial court amended the jury's damages verdict and entered judgment against the District. The trial court also granted Johnson's request for attorney's fees pursuant to Code of Civil Procedure section 1036, ordering fees based on the number of hours spent on the case and a multiplier of 1.5 under the lodestar method.

The District now contends (1) it cannot be liable because it is not authorized to provide flood control, (2) even if it could be held liable in inverse condemnation for flood control, strict liability would not apply, (3) the trial court erred in limiting the jury's consideration of damages to the full fair market value on the first day of trial, (4) the trial court erred in increasing the jury's damages award for personal property, and (5) the trial court erred in employing the lodestar method without regard to the attorney's fees actually incurred.

We conclude (1) regardless of whether the District has statutory authority to provide flood control, its decision to divert water onto Johnson's property supports inverse condemnation liability; (2) strict liability was the proper standard because the District's project was not a public flood control project that failed as designed, it was instead a repair project that worked as designed, intentionally flooding the Johnson property; (3) the trial court properly limited the evidence and jury instructions to the jury's determination of the full fair market value of the Johnson property on the first day of trial; (4) the trial court properly increased the damages award for personal property to conform to the evidence; and (5) the trial court's award of attorney's fees, using the lodestar method such as is used in some civil rights cases, is contrary to the requirement in Code of Civil Procedure section 1036 that attorney's fees are limited to what the plaintiff actually incurred.

We will affirm the judgment as to liability and damages but reverse the attorney's fee award and remand for further proceedings.

## BACKGROUND

In December 2010, Johnson owned a five-acre parcel on Rossier Road in Escalon. She resided there with Richard Johnson and Jessica Marquez. The Rossier Ditch ran along Rossier Road, next to Johnson's property, and drained both irrigation and storm-water run-off. Water in the ditch flowed through a control box owned by the District and into the District's water conveyance system known as the B-15 Line. Inside the control

box, a gate, called the Ludlow Gate, stopped water from flowing into the B-15 Line if the gate was closed. Until December 2010, the Ludlow Gate had been left open to allow storm water to drain into the B-15 Line every winter since at least 1953, when the District and the County of San Joaquin entered into a written agreement authorizing the county to drain water from the Rossier Ditch into the B-15 Line.

In November 2010, the District began repair work on the B-15 Line. To avoid creating mud and slowing down the repair work, the District closed the Ludlow Gate. The District took no action to reroute water that would normally run through the Ludlow Gate into the B-15 Line; rerouting would have cost about \$23,000.

As a result of unexceptional, seasonal rainfall starting in December 2010, water that would have flowed through the Ludlow Gate into the B-15 Line backed up and flooded Johnson's property. The District refused to open the Ludlow Gate, not wanting water to hinder the repair work. As rains continued, Johnson's property essentially became a retention basin for contaminated storm water. Through January and into February 2011, Johnson's property remained flooded. The fire department directed Johnson to vacate the property as it had become a safety hazard. The water damaged the home and personal property in and around the home.

Because the flooding made the residence uninhabitable, Johnson was forced to rent another residence and pay other related expenses. As a result, she was unable to make her mortgage payments on the Rossier Road property and lost it through a short sale in February 2011.

Additional facts and procedure are recounted in the Discussion.

## DISCUSSION

### I

The District contends it cannot be held liable for failure to drain storm water because (A) the Ludlow Gate and B-15 Line were not designed for flood control, (B) the

District is not authorized to provide flood control, and (C) Johnson did not make substantial expenditures in reliance on the District's keeping the Ludlow Gate open.

A

The District claims that its project did not, as a matter of inverse condemnation law, cause the flooding of Johnson's property because its drainage system, including the Ludlow Gate and the B-15 Line, was not designed or built for flood control.

Article I, former section 14 of the California Constitution provided: "Private property shall not be taken or damaged for public use without just compensation . . . ." To recover for inverse condemnation, a private property owner must show that private property was "taken" or "damaged" by the acts of a public agency. (Cal. Const., art. I, § 19.) "[T]here must be an invasion or appropriation of some valuable property right which the landowner possesses and the invasion or appropriation must directly and specially affect the landowner to his injury." (*Marina Plaza v. California Coastal Zone Conservation Com.* (1977) 73 Cal.App.3d 311, 325.) The state must compensate owners who suffer actual physical injury to their property proximately caused by a public improvement as deliberately designed, constructed, and operated. (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303-304.)

Here, the District must compensate Johnson because it deliberately closed the Ludlow Gate as it repaired the B-15 Line, thus making the Johnson property a retention basin for storm water. Nevertheless, the District argues this conclusion is flawed because drainage of storm water was not the intended use of the Ludlow Gate and the B-15 Line; rather, the sole intended use was for drainage of irrigation water. In support of this argument, the District primarily cites *Kambish v. Santa Clara Valley Water Conservation Dist.* (1960) 185 Cal.App.2d 107 (*Kambish*). That case, however, is inapposite.

In *Kambish*, a water conservation district stored water in a reservoir during the rainy season and released water in the dry season. The district had no flood control function. During a rainy period, water overflowed the banks of a canal downstream from

the reservoir and damaged the plaintiff's property. The plaintiff, in an inverse condemnation action, alleged that the district could have, but did not, control the flow of water in the canal to avoid flooding the plaintiff's property. A jury awarded damages to the plaintiff. (*Kambish, supra*, 185 Cal.App.2d at pp. 108-109.) The Court of Appeal reversed, holding that because the district's sole purpose was water conservation *and* the district did nothing that augmented the flow of water in the canal beyond what would have been the flow without the reservoir, the district could not be held liable on an inverse condemnation theory. (*Id.* at pp. 110-111.) The Court of Appeal noted: "the charge against the district is only that it failed to divert or spread the flow, not that it in any way augmented the natural flow of the stream." (*Id.* at p. 111.) The court concluded: "Damage resulting from negligence in routine operation having no relation to the function of the project as conceived is not a taking for public use and thus not a basis for inverse condemnation. [Citation.]" (*Ibid.*)

The District cites *Kambish* for the proposition that if a government agency is not responsible for flood control services, there can be no inverse condemnation liability for storm-water flooding caused by the government agency's activities. The District argues: "[J]ust as in *Kambish*, [the District] was under no duty to provide flood control. Rather, its public purpose was to provide irrigation services, which can only be reliably provided if the system is properly maintained." But, unlike the activities of the district in *Kambish* which did not worsen the property owner's flooding, the District's maintenance of its system, during which it closed the Ludlow Gate and did not provide for alternative water flow, caused the flooding on Johnson's property. In other words, the way in which the District deliberately designed, constructed, and operated its system caused the flooding. We see no significance in the fact that the particular water that flooded the Johnson property was storm water rather than irrigation run-off because the District's actions prevented water that normally would have flowed away from the Johnson property to

back up onto that property. The District's repair project caused the Johnson flooding. Therefore, *Kambish* is unhelpful to the District.

## B

Similarly, the District argues it is statutorily prohibited from providing flood control and had no authority to enter into an agreement with the county to accept responsibility for flood control.

Irrigation districts, such as the District, are creatures of statute, and they have no powers beyond those granted by statute and those essential to fulfill the statutory function. (*Water Quality Assn. v. County of Santa Barbara* (1996) 44 Cal.App.4th 732, 746.) Division 11 of the Water Code pertains to irrigation districts. (Wat. Code, § 20500 et seq.) Water Code section 22160 provides that an irrigation district “may, but shall not be required to, provide for, maintain and operate such works and facilities within or without its boundaries as the board may deem necessary to protect the land in, and the property of, the district, from damage by flood or overflow . . . .” However, Water Code section 22162 states that Water Code section 22160 “appl[ies] only to districts containing 200,000 acres or more.” The District contains only 72,000 acres. Based on these statutes and the District's acreage, the District argues that, by implication, it is statutorily prohibited from providing flood control. It further argues that its 1953 agreement to accept water from the county's Rossier Ditch is void because it is ultra vires, beyond the District's authority. In essence, the District is claiming it lacks authority to do what it has been doing for more than 60 years.

We need not determine whether the District was statutorily prohibited from providing flood control or whether the 1953 agreement was beyond its authority and therefore void. The question here is not whether the District had authority to provide flood control services; the question is whether, in conducting the repairs to the B-15 Line, it could divert water onto the Johnson property and damage the property without inverse condemnation liability. We conclude the District's decision to use the Johnson property

as a retention basin for naturally flowing water supports inverse condemnation liability. It is undisputed that the District had authority to conduct the repairs on the B-15 Line. Even if the District could not provide flood control services and invalidly agreed with the county to provide those services, it engaged in a taking of Johnson's property when it intentionally diverted the flow of water onto her property to protect its construction project. (See *Akins v. State of California* (1998) 61 Cal.App.4th 1, 29 [inverse condemnation when agency diverts water to make private property a retention basin].)

## C

Relying on *Natural Soda Products Co. v. Los Angeles* (1943) 23 Cal.2d 193, the District contends Johnson cannot recover in inverse condemnation because she did not establish that she made substantial expenditures in reliance on the District keeping open the Ludlow Gate. The California Supreme Court explained in that case: "It is generally recognized that one who makes substantial expenditures in reliance on long-continued diversion of water by another has the right to have the diversion continued if his investment would otherwise be destroyed. [Citations.]" (*Id.* at p. 197.) But the District's argument lacks merit because *Natural Soda* is a tort and injunctive relief case, not an inverse condemnation case. The District fails to cite authority that applies this substantial-expenditures limitation to inverse condemnation. (See *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 809 (*Housley*) [noting that *Natural Soda* is a tort case, not a case involving inverse condemnation principles].)

## II

The District next contends that even if it could be held liable in inverse condemnation for flood control, strict liability would not apply.

While strict liability is the usual standard for evaluating inverse condemnation claims, a more lenient reasonableness standard applies to public flood control projects. The District contends that if it is subject to liability in inverse condemnation for flood control, the reasonableness standard would be applicable and the evidence was

insufficient to find the District liable under that standard. We conclude the strict liability standard applies here.

“Inverse condemnation cases originally were analyzed with reference to traditional tort and property law concepts under the assumption that inverse condemnation liability tracked private party liability. [Citation.] The Supreme Court changed this assumption in *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250 [*Albers*], which held that a property owner may recover just compensation from a public entity for ‘any actual physical injury to real property proximately caused by [a public] improvement as deliberately designed and constructed . . . whether foreseeable or not’ (*id.* at pp. 263-264).

“*Albers, supra*, 62 Cal.2d 250, recognized two exceptions to the rule of strict liability: (1) where the damages were inflicted in the proper exercise of the public entity’s police power, and (2) where the public entity had a common law right to inflict damage, as where an upper riparian owner is privileged to protect against the common enemy of floodwaters. [Citation.] This second exception is known as the ‘common enemy doctrine.’ [Citation.] It ‘holds that as an incident to the use of his own property, each landowner has an unqualified right, by operations on his own land, to fend off surface waters as he sees fit without being required to take into account the consequences to other landowners, who have the right to protect themselves as best they can.’ [Citation.]

“*Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550 (*Belair*) represented a change in the analysis of a public entity’s liability in inverse condemnation where, under *Albers, supra*, 62 Cal.2d 250, the public entity had a common law right to inflict damage under the common enemy doctrine. (*Belair, supra*, at p. 563.) *Belair* involved a levee failure after a series of heavy storms. (*Id.* at p. 555.) *Belair* reasoned that while strict inverse condemnation liability might not be appropriate in the case of public flood control improvements, such improvements should not be cloaked with the

same immunity as private flood control measures. (*Id.* at p. 564.) *Belair* adopted a rule of reasonableness in such situations, which balanced public need against the gravity of private harm. (*Id.* at p. 566.)

“*Belair* adopted a rule of reasonableness rather than one of absolute liability because absolute liability would discourage beneficial flood control improvement, but would still compensate for losses that were unfairly incurred. (*Belair, supra*, 47 Cal.3d at p. 565.)” (*Biron v. City of Redding* (2014) 225 Cal.App.4th 1264, 1272-1273.)

Here, the trial court, out of an abundance of caution, applied both the strict liability and reasonableness standards and found the District liable under each. We conclude the strict liability standard was proper. Therefore, it is unnecessary to discuss the reasonableness standard.

The trial court determined that Johnson established the elements of strict liability because: (1) Johnson had an interest in the real and personal property, (2) the District substantially participated in the planning, approval, and construction of the project, (3) Johnson’s property was damaged, and (4) the District’s project was a substantial cause of the damage.

The District argues the strict liability standard would not apply in this case if this was a flood control project. But the argument fails because the District intentionally caused the flooding, which is different from attempting to provide flood control and failing in the attempt. “The [] reasonableness test applies to cases involving public flood control works that cause physical damage to private property,” and “courts should use [the reasonableness] factors in cases where a public entity’s flood control measures, designed to protect against potentially dangerous periodic flooding, cause property damage.” (*Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 454.)

The District’s project was not a flood control project that failed as designed to protect from flooding; it was a repair project that worked as designed by keeping the

construction area dry while intentionally flooding the Johnson property. For that reason, the reasonableness standard applicable to public flood control works does not apply here.

### III

The District further argues the trial court erred in limiting the jury's consideration of damages to the full fair market value of the property on the first day of trial. The jury, by special verdict, found that the fair market value of the Johnson property was \$315,000 as of October 20, 2014, the first day of trial.

“The normal measure of ‘just compensation’ in most inverse condemnation cases is the same as that which applies in eminent domain proceedings: ‘fair market value.’ [Citation.] This measure is not based on what the taker has gained, but rather is based on what the owner has lost. [Citation.]” (*Housley, supra*, 20 Cal.App.4th at p. 807.)

While there are rare situations where alternative measures of damages may be used because fair market value cannot offer just compensation, there is nothing in the record to suggest why that would be the case here. (See *Pacific Gas & Electric Co. v. County of San Mateo* (1965) 233 Cal.App.2d 268, 274-275 [listing possible alternative methods of measuring damages, including the cost of making repairs]; but see *Housley, supra*, 20 Cal.App.4th at pp. 807-808 [noting the “cost of repair” is only appropriate when warranted by peculiar facts like those found in *Pacific Gas*].) Here, Johnson lost the property, so a cost-of-repair measure of damages has no application.

The question on this issue was how to apply the fair-market-value method. Johnson argued the proper way to apply the method was to determine the fair market value of the property and award that amount. The District argued the proper award of damages was for the diminution in value to the property, that is, the difference in fair market value before and after the flooding. The trial court ruled in favor of Johnson because Johnson completely lost the property as a result of the District's actions. On appeal, the District finds fault with the trial court's ruling because the District was not

allowed to produce evidence or obtain a jury instruction on the diminution-in-value measure of damages or on Johnson's financial condition.

At trial, the trial court limited the evidence of damages to the fair market value of the real property. The trial court did not allow evidence that Johnson was in a precarious financial condition at the time of the flooding, she had a mortgage on the property and was two months behind in her mortgage payments, and the amount owed on the mortgage exceeded the equity in the property. The trial court also limited fair market value evidence to the value on the first day of trial. (See *Mehl v. People ex rel. Dept. of Pub. Works* (1975) 13 Cal.3d 710, 719 [inverse condemnation damages valuation as of first day of trial].)

In its statement of decision, the trial court summarized the law concerning inverse condemnation damages and then gave its reasons for determining that the measure of damages would be the full fair market value: "Mrs. Johnson testified that following the flooding of her home, she and her son [Richard Ray Johnson] were unable to afford [] both the cost to repair and keep the Johnson Parcel, and the rental expenses and incidental expenses they were forced to incur for alternate housing as a result of their own home being rendered uninhabitable. The Court finds this testimony credible and accepts it and concludes that Mrs. Johnson involuntarily lost the Johnson Parcel as a result of the December[] 2010 flooding of the Johnson Parcel and[,] if the flooding had not occurred, there is no reason to believe that she would not still be the owner of the property that had been in her family for 40 consecutive years before the flooding."

In support of its argument that it should have been allowed to introduce evidence and get a jury instruction on diminution of value rather than full fair market value, the District cites to cases in which the property owner ultimately was able to keep the property. (See, e.g., *Steiger v. San Diego* (1958) 163 Cal.App.2d 110, 117 [damages for diminution in value when property owner retained property]; *Le Brun v. Richards* (1930) 210 Cal. 308, 319 [same].) Here, the property owner lost the property because of the

government's actions. Therefore, the measure of damages is what was lost: the full fair market value of the property. (*Housley, supra*, 20 Cal.App.4th at pp. 807-808.) As the trial court explained, it is not relevant that there was a mortgage on the property or that Johnson was in a precarious financial condition. The District's project caused Johnson to lose her property.

The District asserts it did not permanently acquire the property from Johnson; the property was sold to a third party in a short sale. Although the District does not support its assertion with citation to authority (see *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546 [assertions without authority are forfeited]), we have confirmed that the law on this point does not favor the District because inverse condemnation focuses on what the property owner has lost, not what the government agency has gained. (*Housley, supra*, 20 Cal.App.4th at pp. 807-808; *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 702 (*Tilem*).) The District has shown us no reason to deviate from that focus here.

In addition, the District complains the award in this case provided a double recovery for Johnson because she also received loan forgiveness through the short sale. Once again the District does not cite authority for this proposition, and once again the law is not helpful to the District. Just compensation is determined without regard to a property owner's other financial arrangements. (See *Tilem, supra*, 142 Cal.App.3d at p. 708 [damages awarded without regard to property owner's tax benefits from the taking].)

We therefore conclude the District was not entitled to introduce evidence of diminution in value or Johnson's financial condition or to have the jury instructed on damages other than to instruct the jury to determine the full fair market value of the property on the first day of trial.

#### IV

In addition, the District contends the trial court erred in increasing the jury's damages award for personal property. The jury awarded damages for personal property to Cleo, Richard and Jessica, and the trial court increased the damages award for each to conform to the evidence.

Evidence Code section 813, subdivision (a) provides, in part: "The value of property may be shown only by the opinions of any of the following: [¶] (1) Witnesses qualified to express such opinions. [¶] (2) The owner or the spouse of the owner of the property or property interest being valued." "A jury hearing a condemnation action may not disregard the evidence as to value and render a verdict which either exceeds or falls below the limits established by the testimony of the witnesses. [Citations.] The trier of fact in an eminent domain action is not an appraiser, and does not make a determination of market value based on its opinion thereof. Instead it determines the market value of the property, based on the opinions of the valuation witnesses." (*Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 (*Aetna*).)

The trial court instructed the jury with CACI No. 3515, consistent with Evidence Code section 813 and *Aetna*: "You must decide the value of property based solely on the testimony of the witnesses who have given their opinion of fair market value. You may consider other evidence only to help you understand and weigh the testimony of those witnesses. [¶] You may find the same fair market value testified to by a witness, or you may find value anywhere between the highest and lowest value stated by the witnesses."

Each plaintiff testified concerning the value of personal property that the plaintiff lost because of the flooding: Cleo (\$8,875), Richard (\$58,205), and Jessica (\$21,300). There was no other evidence introduced concerning the value of the personal property damaged or lost. The jury awarded personal property damages as follows: Cleo (\$7,500), Richard (\$5,000), and Jessica (\$4,000). The amounts awarded by the jury were consistent with the amounts the District suggested in closing argument, but there was no

evidence to support them. On the plaintiffs' motion, the trial court increased each personal property damages award to the amount each plaintiff stated was the value of the personal property damaged or lost.

The District now contends the trial court improperly usurped the jury's function in setting the amount of damages. In making this contention, the District relies primarily on *Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124 (*Marshall*). In that case, the Court of Appeal wrote: "In an inverse condemnation proceeding, when the government agency has presented no counter valuation evidence, is a jury free to disbelieve a plaintiff's valuation testimony and award compensation in an amount less than the losses testified to by the plaintiff?" (*Id.* at p. 1145.) The court concluded: "Plainly stated, the trier of fact is not stripped of its role as the arbiter of a witness's credibility merely because the trial is one to set compensation in an inverse condemnation hearing. The jury must first determine whether or not the witness is credible and thereafter determine the weight to be given to the testimony." (*Id.* at p. 1147.) "The jury was instructed that it could disregard the testimony of a witness that it did not believe. The [government agency's] failure to present affirmative evidence, in effect, set a floor of \$0. By awarding the token \$1, the jury was sending an unmistakable message -- it did not believe the testimony" of the plaintiffs, who were the property owners. (*Ibid.*)

As the District concedes, it did not offer evidence contesting the testimony from Cleo, Richard and Jessica. The sole evidence in this case concerning the value of personal property came from the plaintiffs who were owners of the personal property. Although the court in *Marshall, supra*, 219 Cal.App.3d 1124 was correct in stating that a jury may conclude the witnesses are not credible, here the District makes no attempt to explain what the jury may not have believed about the valuation opinions expressed by the plaintiffs, or why the jury's verdict was supported by substantial evidence. A general assertion that the jury may not have believed the plaintiffs is insufficient to justify a jury verdict outside the range of the valuation evidence properly introduced.

The trial court did not err by increasing the damages for personal property to conform to the testimony.

V

The District contends the trial court erred in awarding attorney's fees because the award was not based on fees actually incurred by Johnson, as required by Code of Civil Procedure section 1036. We agree. Instead of awarding attorney's fees actually incurred by Johnson, the trial court employed the lodestar method used, for example, in some civil rights cases. (See, e.g., *Kerkeles v. City of San Jose* (2015) 243 Cal.App.4th 88, 100 [applying the lodestar method in a civil rights case].) Use of the lodestar method without regard to the fees actually incurred is not authorized by Code of Civil Procedure section 1036.

Code of Civil Procedure section 1036 provides for attorney's fees in a successful inverse condemnation proceeding: "In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation . . . shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff's reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, *actually incurred* because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding." (Italics added.)

Attorney's fees awarded under Code of Civil Procedure section 1036 are limited by the terms of the statute to fees "actually incurred." (*Pacific Shores Property Owners Assn. v. Department of Fish & Wildlife* (2016) 244 Cal.App.4th 12, 58 (*Pacific Shores*); *Andre v. City of West Sacramento* (2001) 92 Cal.App.4th 532; compare *Glaviano v. Sacramento City Unified School Dist.* (2018) 22 Cal.App.5th 744, 748, 756.)

The following is the agreement between Johnson and her attorneys concerning the attorney's fees to be paid:

“Attorney will be compensated for services rendered only if a recovery is actually obtained for the Client by way of settlement, judgment or otherwise. The fee to be paid the Attorney will be the attorney fees adjudged or agreed to as part of an inverse condemnation judgment or settlement. If there is no attorney fee provided for under an inverse condemnation cause of action or otherwise, the fee to be paid to the attorney will be a percentage of the net recovery, as herein defined, as follows:

“Thirty-three and one-third percent (33 1/3%) if recovery is obtained prior to the arbitration hearing or settlement conference, whichever occurs first;

“Forty percent (40%) if settled within ten (10) days of trial or during trial or after trial;

“Fifty percent (50%) if settled after an appeal has been filed.”

Later, the attorney-client agreement reiterated: “If there is no recovery, Attorney will receive no attorney’s fees.”

In this case, the trial court applied the lodestar method instead of determining what attorney’s fees Johnson actually incurred. The trial court awarded fees by multiplying the number of hours devoted to the case by Johnson’s attorneys (1,834.1 hours) by the hourly rate suggested by Johnson for each of her attorneys. That rendered a lodestar amount of \$635,907.50. The trial court then applied a 1.5 multiplier “based on the significant risks taken in litigating this case on a contingent basis, advancing costs of approximately \$83,000 with no chance of recovering them from the financially vulnerable plaintiffs, the complexity of the issues, the need to provide access to justice to those who could not otherwise afford it[,] the skill displayed by plaintiffs’ attorneys, the results obtained by the attorneys for the plaintiffs and because this extensive litigation was pending for over 4 years precluded other employment by [the attorneys].” Multiplying the lodestar amount by 1.5 rendered a total attorney’s fee award of \$953,861.25.

In *Pacific Shores*, involving a similar attorney’s fee provision in the agreement between the inverse condemnation plaintiffs and their attorneys, we concluded that an

attorney's fee award based on the contingency-fee provision was correct under Code of Civil Procedure section 1036. (*Pacific Shores, supra*, 244 Cal.App.4th at pp. 58-64.) In that case, the attorney's fee agreement provided that the fees would be \$225 per hour, but the amount the attorneys would receive would be "the greater of [1] those fees awarded by the court in a final judgment, or [2] the recovery from the settlement or final judgment resulting from the lawsuit, pursuant to the following: [¶] . . . [¶] (c) Forty percent (40) percent [*sic*] of the recovery if any recovery is obtained after trial . . . ." The trial court rejected the argument that the plaintiffs should receive an award under Code of Civil Procedure section 1036 based on time spent on the case by the plaintiffs' attorneys and instead awarded attorney's fees based on the contingency clause (40 percent of the recovery). (*Id.* at p. 58.) We affirmed, reasoning: "The contingency agreement obligated plaintiffs to pay in attorney fees 40 percent of any recovery awarded after trial. The agreement thus capped the amount of fees the court could award under [Code of Civil Procedure] section 1036 to that amount, and the court awarded the full amount. The court did not err in doing so." (*Id.* at p. 62.)

Johnson argues Code of Civil Procedure section 1036 supports the attorney's fee award in this case: "While the fee agreement did not set forth a fixed dollar amount of the attorney fee, this is not required since the performance promised is reasonably certain. If the Johnsons refuse to pay the amount set by the court and incorporated into the judgment which was then paid by [the District], the attorneys would file a breach of contract action against them and would prevail." But this argument would lead to a circular, flawed result. If a fee agreement does not set forth a basis to determine a fixed dollar amount for attorney's fees, and instead is based solely on what the trial court orders in fees, then there is no basis for the trial court to determine the fees "actually incurred" under Code of Civil Procedure section 1036 until after the trial court issues its fee order. Here, however, as in *Pacific Shores, supra*, 244 Cal.App.4th 12, the fee

agreement includes percentages that may form a basis for determining the amount actually incurred without resort to circular reasoning or the unauthorized lodestar method.

Johnson also argues that public policy supports the attorney's fee award in this case. That argument should be made to the Legislature, not to this court. "[T]he Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state. [Citations.]" (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71.)

Accordingly, we will reverse the attorney's fee award and remand for further proceedings on the issue.

The District argues Johnson was not entitled to attorney's fees on all her causes of action and the trial court was required to apportion attorney's fees among the several causes of action. Because we will reverse the attorney's fee award and apportionment of attorney's fees is subject to the trial court's discretion (*Carver v. Chevron U.S.A., Inc.* (2004) 119 Cal.App.4th 498, 505), we need not consider apportionment in this appeal.

#### DISPOSITION

The judgment is affirmed as to liability and damages but reversed as to the award of attorney's fees. The matter is remanded for further proceedings concerning attorney's fees consistent with this opinion. Each party shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

\_\_\_\_\_  
/S/  
MAURO, J.

We concur:

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/S/  
BLEASE, Acting P. J.

\_\_\_\_\_  
/S/  
BUTZ, J.